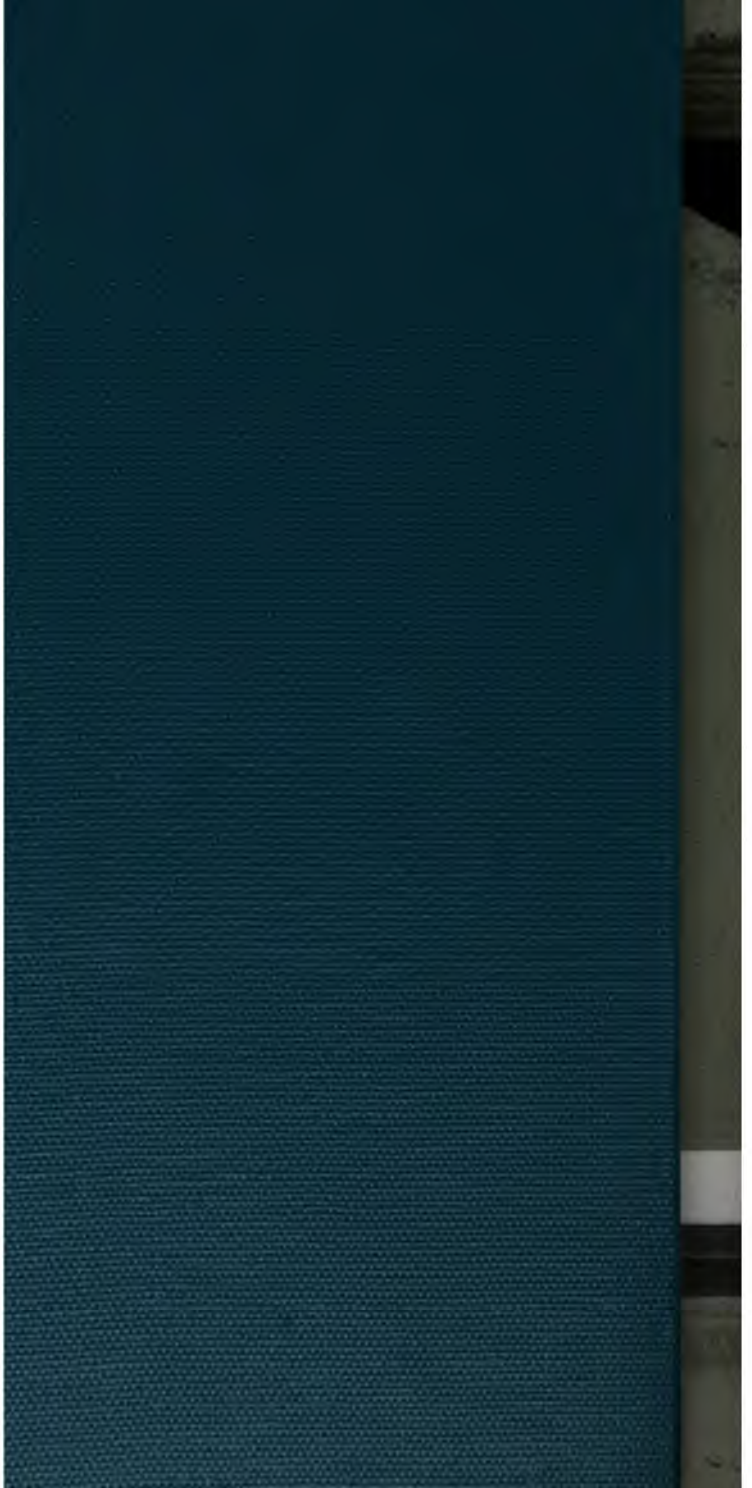

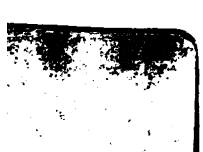

A

LECTURE

BEING THE SECOND OF A

Series of Lectures,

INTRODUCTORY TO A

COURSE OF LECTURES

NOW DELIVERING IN THE

UNIVERSITY OF MARYLAND.

BY DAVID HOFFMAN.

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SECOND

INTRODUCTORY LECTURE.

In my first Introductory Discourse, delivered in this place, besides the general topicks suggested by the enterprize in which I am engaged, I endeavoured to show you the essential connexion between the various subjects embraced in the First and Second Titles of the Syllabus of these Lectures; these titles comprehending first, *Metaphysicks, Ethicks*, and *Natural Law;*—secondly, the learning of the *Feudists*, and what has been technically called the *Doctrine of the Realty*. In pointing your attention to the *first* class of subjects, I aimed to impress on your minds their great importance, and how intimately akin they are to the proper studies of the accomplished lawyer. In that lecture I endeavoured to illustrate their utility; the links by which they are associated; and the necessity of proceeding in your studies methodically, from the contemplation of

the foundations of *moral obligation*, in the original structure of the mind, to the view of these obligations as they are contemplated or modified in *society*, whether of *individuals* or of *nations*. Your attention was then carried to that peculiar organization of civil society, called the Feudal System, from which the government and laws of modern communities have taken a permanent tincture; and I endeavoured, in the last place, to indicate more particularly the pervading connexion between the general feudal law, and that refined system of the English Law which affects *landed* property;—a system the whole of whose parts demonstrate its origin and structure to have been feudal; and which is consequently very unintelligible without the aid of feudal learning.

In the present discourse we shall present you with some observations on the connexion of the various subjects embraced under the *Third* Title of the Syllabus; viz. the Law of *Personal Rights, and Personal Remedies;* and as I shall in my succeeding introductory discourses pursue the same plan in regard to the successive titles of the course, they will form a Series of Essays on the general features, leading relations, excellencies, and defects of each of the grand divisions of the law.

This third title or branch of our subject, gentlemen, embraces *first*, personal *rights*, and *secondly*, the means or *remedies* established by law for their assertion; together with a variety of incidental matters, which will be presently mentioned.

Personal *rights* may be considered 1st, in regard to the *individual* or person; 2dly, as they are affected by his *relations* in society; which may be those of husband and wife, parent and child, master and servant, guardian and ward, governor and governed. The *remedies* adopted for the enforcement of these rights, are also susceptible of a great variety of divisions; involving the several topicks of *Courts* and their organization; *Officers* of courts, their duties and powers; the *forms* of action and procedure, denominated *pleading* and *practice;* after which follow, in succession, the modes of *trial;* the requisite *evidence* to sustain them; the *errours* in these proceedings, with the redress by *appeal* &c. to superior tribunals; and lastly, the means of enforcing decisions of courts by *execution*, which is favoured in the law, as it is *fructus, finis et effectus legis*,—the very *life, aim*, and *effect* of the law.

The gradual evolution of these subjects, in the order of their natural connexion, is essential to their right understanding, and their easy attain-

ment. If the ties associating these apparently dissimilar subjects, be not properly regarded, we lose much of the spirit and philosophy which really appertain to them; and we pursue our studies with as little interest as one who travels a labyrinth, ignorant that its numerous windings are in any way connected, or that they all tend to one desired goal. May we not, indeed, attribute much of the *ennui* which even pleasing subjects sometimes occasion, to the limited view we take of their important divisions, to that view which confines the mental eye to the *parts* of a great whole, leaving blanks in the vision at the points of their connexion.

It will be my endeavour, when I come to treat of these topicks, to show with some minuteness these points of association: all that we shall at present attempt, is to exhibit their general relations to each other; and to remove, if possible, some popular grounds of cavil in regard to them.

I would remark in the outset, what is emphatically true in regard to the *lex mercatoria*, and some other branches of English jurisprudence, that the learning of *personal rights and remedies* is much less tinged with feudal principles, and the technicalities growing out of them,—and proceeds much more on the general grounds of *obligation* and *morals*, than does that of the *realty*. Hence

its conclusions are less remote from our ordinary comprehension, and its reasoning more within the compass of a mind unfashioned to the contemplation of subtilties.

It is true, indeed, that feudalism did exercise no small portion of influence even on this branch of English jurisprudence: as, for example, in the doctrine of guardian and ward, particularly before the statutory modification of that law; and, in some degree, in the various forms of real and personal actions; and even in pleading, practice, and the modes of trial. But in general it will be found that the feudal spirit is most visible in all that concerns lands, tenements, and hereditaments, which are coextensive with the entire doctrine of the realty.

I have already remarked, gentlemen, that the learning of the *personal* law is extremely various; it may hence occur as a question to the student, by what *general* bond of connexion is it that topicks so dissimilar are united under one general division of personal law. With what justice, it may be asked, has the term "*personal rights*" been adopted; and, when adopted in compliance with established usage, how are their boundaries distinguished from those of *real rights?* It may be justly observed that, in point of metaphysical

truth, all *rights* being inherent. (not in things, which are incapable of rights,) but in persons, are *personal* rights: the phrase "*real rights*," therefore, seems to be a solecism adopted in order to avoid a periphrasis, namely, "*personal rights as they are connected with the realty.*"—This point, however, has been canvassed by me elsewhere; and it is rather the object of the present remarks to show how it comes to pass, that so large a body of topicks, many of which do undoubtedly concern the realty, as well as personalty, are nevertheless usually treated under the general head of "*personal law.*"

A philosophical, and, at the same time, a practical analysis of the laws of England, is a task of no easy accomplishment. It is certainly desirable that every integral portion of the system should be found in the analysis in its proper place. "The scheme should be so comprehensive as that every title might be reduced under some one or other of its general heads, which the student might pursue to any degree of minuteness; and, at the same time, so contracted that he might, with tolerable application, contemplate and understand the whole."

With this view Lord Hale prepared his celebrated analysis. Several anonymous productions

of a similar kind, subsequently appeared, and finally Mr. Justice Blackstone, and Mr. Nolan published their analyses. They all, however, have adopted nearly the same division of their subject, and almost exactly the same phraseology. The fact is, that the laws of the realty and personalty are, in some instances, so intimately blended, that separation is impossible; and in others the personalty is so much the more important, that it gives the *name* or character to the title, although under it is also to be found much that equally appertains to the realty. Thus, for example, students will find in the Syllabus I have presented to them, that various subjects are placed by me exclusively under the head of the personalty, when, in truth, several of these topicks embrace much that concern real rights, and real remedies. This arises either from the fact, that these branches more *generally* relate to the personalty than to the realty; or that, although *land* may be the object, the *remedy* is not *in rem*, but *in personam*; or, finally, from some other cause which gives to the personalty a preponderating influence, entitling it to give the subject a place under its auspices, rather than those of the realty. As for example: You will find in the Syllabus, under the title of the Personalty, the subject of

legacies, though legacies are often charged on lands. The extensive subject of contracts and agreements, many of which also concern the realty, and may require a specifick performance, are, nevertheless, found under the same head. So fraud and duress, which are as likely to occur in agreements concerning the realty as personalty, are yet treated generally under the latter head. So likewise execution, with its incidents, may affect *lands*, as well as *chattels* or the *person;* yet the nature and various kinds of execution operating on *lands*, are treated under the cardinal division of personal law. *Courts*, also, exercise as large a jurisdiction over territorial rights, as they do over mere personal interests, and, nevertheless, courts and their powers you will find under the same general head. In fine, evidence and pleading, which equally apply to contracts and injuries affecting *lands, tenements*, and *hereditaments*, are still assigned exclusively to this division of our subject. The truth is, that this arrangement, though convenient and generally understood, is technical. All rights, as I have said, are personal; but being differently modified, according to the different *subjects* on which they operate, or to the different *relations* in which we stand to each other, they take different names:

the *real* law is, therefore, that branch of the rights of persons which operates on *real property*, with its own peculiar rules arising from its subject-matter—LAND; in the same way that the *lex mercatoria* is a branch of the personal law, with peculiarities arising from *its* subject-matter—MERCHANDISE. We must, therefore, bear in mind, as in other things, that what does not fall under the *exceptions*, will be found to be embraced by the class; so that in the law, what is not referrible to any special division, belongs to the great body of the law of *personal rights* and *personal remedies*. There is another reason, arising from the general principle of classification, which operates to throw the consideration of a very large number of topicks under this third title of our course. The assertion of all rights must necessarily be made through the intervention of *persons*, either of *courts*, which are a kind of artificial or political persons, or of their *officers*. And the powers with which the law invests them for this end, cannot in any way be so conveniently considered as by bringing them all together, and arranging them in distinct titles, under the general head of personal law. Thus, we have seen that courts have powers which directly affect lands, and that execution may be levied on the realty,

and yet that both these subjects naturally and philosophically fall under the general head; so that the division of the *jura personarum* will be found to comprehend *first*, the rights of persons strictly so called, viz. to *life*, *liberty*, *reputation*, &c. *secondly*, the various rights flowing from the *relations* of society, as that of parent and child, husband and wife, guardian and ward, &c. &c. It then passes to the consideration of various *positive* relations, which embrace, among others, those who are invested with political and civil magistracy, or those who, though under the protection of society, are disqualified, in some degree, from partaking of its rights: to this head belong the topicks of infancy, idiocy, lunacy, &c.; and finally, those who, though they are not members of the state, are yet under its protection as temporary residents within it, either on their own private concerns, or the business of sovereigns, viz. aliens, ambassadors, consuls, &c. These several sorts of natural persons, with their incidental rights and relations, being considered, we are led next to artificial ones, viz. corporations, which are societies that emanate directly and expressly from the authority of the great political corporation, or body politick, or are sustained by prescription. In connexion with these we find treated the sub-

jects of statutes and by-laws.—The rights flowing from the various relations of men during their life being disclosed, we pass on to those consequent on the alienation of property; first, in contemplation of *death;* and herein are treated the law of wills, testaments, intestacy; the duties of executors, administrators, &c.; and secondly, the disposition of property or rights *inter vivos;* which comprehends the more general topicks of contracts and agreements, and the modes by which our interests may be delegated to, and conducted by others, viz. the law of *agency* or *authority;* and this branch of the personal law is concluded by inquiring how far ill faith and illegal compulsion may vitiate the contracts into which parties may be drawn,—which topicks are assigned to the heads of *fraud* and *duress.*

Our natural and adventitious personal rights being considered, we proceed to the *means* provided by law for their enforcement. This involves the consideration of *courts,* their organization and jurisdiction, whether general or special; their *officers* and their *powers.* As the rights which are sought to be vindicated, and the contracts to be enforced in these tribunals, differ very much according to the subjects of them, we proceed to treat in order of all the various *actions* which

wisdom and experience have established for these ends. And as these have their boundaries and forms of procedure, we next inquire in what mode courts of justice expect the *allegations* and *defences* of the parties litigant to be set forth: this includes the important and refined doctrines of *pleading* and of *practice*. In close connexion with these we find the extensive learning of *evidence*,—a topick full of interest, and one on which the student must be content to dwell with persevering and unwearied attention, till not only the principles of this sublime philosophy of proofs and probabilities, but their various applications be so identified with his mind, that the law and reason thereof shall instantly present themselves, with scarcely an exertion of the memory.

But inasmuch as mistakes occur in proceedings, and errors infect the wisest tribunals, we, in the next place, unfold the various provisions made for correcting these mistakes, and revising these decisions.—These subjects are discussed under the heads of *bills of exception*, *writs of error*, *supersedeas*, *scire facias*, *auditâ querelâ*, and *injunction*; and, in the last place, we speak of the mode which the law hath appointed for the fulfilment of its judgments; and herein we treat of the different kinds of execution, varying according to the policy

of the state, or the election of the creditor, as he may deem the *person*, the *land*, or the *goods* of his debtor the best security for his claim. In the arrangement of these numerous topicks, I have consulted their natural order and dependence, and hope I have so disposed them as to render each subsequent subject more intelligible from the previous consideration of those which precede it.

I must not here omit to remark, as I have previously intimated, that the student will find in many of the subjects connected with this title, the eminent utility of being well initiated into the fundamental principles of Morals and of Natural Law. In the decisions of courts, interpretative of contracts, the student will find perpetual references to the elementary principles of that science which is embraced in the first title of this course; and whose study I cannot cease to recommend to his especial attention. The rights of persons, in the technical meaning of the phrase, and the laws of contracts, are, notwithstanding all the numerous provisions of particular statutes, founded essentially on those great general maxims common to all countries, and arising out of the very nature of man and of human society. These maxims of natural jurisprudence have assumed the form of a distinct and important science in the works of

Plato, Aristotle, Cicero, Seneca, and many other antient worthies; in the wisdom of the civilians of old; in the enlightened pages of Grotius, Puffendorf, Heineccius, Pothier, Bynkershoek, and the whole host of moral writers, whose productions must ever be resplendent in the annals of mental philosophy.—It is in vain for students to urge that all this is but *common sense*, and *"nature methodized,"*—that natural jurisprudence may with safety be left to the conclusions of their own minds; and that the whole system of morals being based on eternal and immutable principles, must readily occur to every well regulated mind. If this be true, then indeed have Wolfius and Heineccius, Hutchinson, Reid, Stewart, Paley, and Rutherforth written in vain. But can this be true? Have those great minds settled no doubtful points in morals? Have not their reasonings, classifications, definitions, pithy rules, and sententious maxims reared a science out of chaos? Take for example the subject of interpretation, or the construction of contracts. How much light has been shed on this topick, and what numerous aids are afforded us in the pages of Grotius, Puffendorf, Locke, Tillotson, Vattel, Rutherforth and others, and yet how apparently simple are these rules, when once ascertained! How often have the en-

lightened judges of England been obliged to consult the pages of these philosophers unhappily so much neglected by students in this country. The construction of the statute of frauds, to mention a few instances in a thousand, turned on the nature and essence of an agreement, as defined in the volumes of Natural Law. So likewise in the great case of Miller v. Taylor, 4 Burr, 2303, in which was discussed with singular learning and ability the question of literary property, we find all the judges perpetually referring to the elementary principles of natural jurisprudence, and their familiarity with the writings of all antient and modern jurists treating this subject, evinces their respect for the learning and for the authority of these writers.

On this topick (thus digressively introduced,) we take great pleasure in fortifying our opinion heretofore often expressed, by that of one of the most distinguished of our own civilians. Speaking of natural jurisprudence, Mr. Duponceau says, "when the principles of that science are sufficiently disseminated, they will fructify; and statutes and judicial decisions will gradually take their colour from them. System will be introduced where it is wanted, sound theories will take

place of false ones, and the rules of genuine logick will direct their application to particular cases." "The common law," continues he, "is destined to acquire in this country the highest degree of perfection of which it is susceptible; and which will raise it, in all respects, above every other system of laws, antient or modern. But it will not have fully reached that towering height, until the maxim shall be completely established in practice as well as in theory,—that pure *ethics*, and sound *logic* are also parts of the *common law*."*

But to proceed: In regard to individual rights the law of England and this country, but more especially our own, may claim the just praise of transcending all other systems of law in tenderness to the rights and liberties of the citizen, and in the security of his property from a despotick and irregular control of the government. Nor, when we compare the course of their legal procedure with that of all other countries, do we find such strong grounds for the ordinary complaints of the tardiness and uncertainty of justice. And if some difference in these points be perceptible between the forms of English and American judicature, and other more summary ones, in countries

* Dup. on Juris. 132.

more arbitrarily governed, we should before we hasten to blame, reflect whether we should be willing, for the obtainment of more expedition in justice, to sacrifice the correctness of legal decisions, the certainty we obtain of the principles whereon they proceed, and the delicate caution with which the highest tribunals handle the privileges, and determine on the rights of the citizen. In regard to the tardiness of legal proceedings, it must be confessed that our law is obnoxious to some censure; but whilst this is the case, it must also be as fully conceded, that as much, if not more, of the vexatious delays of the law are owing to its ministers, as to the inherent defects in the laws themselves,—and that if courts, and particularly lawyers, were to hasten the march of justice with only half the rapidity assigned to it by the law, no serious grounds of complaint in this respect would remain. In regard to the certainty of justice, this must ever depend on the learning and virtue of those who are called to distribute it. The wisest laws may be misapplied by the vicious; and their clearest provisions be misinterpreted by the ignorant.

The rules of the English law as to the rights and obligations of men in their private relations, are framed with a just regard to their incapacities

and weakness on the one hand, and to the wholesome preservation of justice on the other.—This is generally manifest throughout that extensive and varied system. If, for instance, the law, for wise purposes, deems the servant to be under the control of his master, the wife of her husband, the child of its parent; it relaxes this principle in all cases where it is obviously against his own better knowledge, though in obedience to such control, that either of these subjected persons transgresses the injunction of the law. Thus a servant is, indeed, excused for performing his master's command; but not to commit a felony. So also a wife renders her husband responsible for her debts, as for most purposes her legal existence is merged in that of her husband;—but if he be exiled, is banished, or has abjured the realm, the reason ceasing, the rule ceases also, and she is made responsible. So likewise magistrates and officers are protected in the discharge of their functions; but they shall not be allowed, under colour of these, to violate the privileges of the citizen by an extra-judicial or ministerial act. So again, in regard to most of the fictions and intendments of the law, they will be found to have originated in grounds either highly rational or politick. As for example, that a corporation has no soul, and never

dies; that the binding efficacy of collateral warranty and of fines and recoveries, is owing to a supposed *excambium*, or recompense in value, in lieu of the lands affected by them; that a bond made beyond sea, may be pleaded to be made at Leghorn, to wit in Baltimore, in the county aforesaid;—that there is no variance in the case of writs taken out in vacation, but bearing teste the last day of the preceding term; that in an action for the seizure of a vessel, a declaration stating that it was done on the *high seas*, videlicet in *Cheapside*, is not incongruous; that in assumpsit, though the promise is expressly stated, none need exist or be proved; that in trover, though it be stated that the defendant found the goods, yet the finding need not be proved; that in ejectment various matters are to be asserted, which in truth never occurred; that a writ which orders the sheriff to have the defendant's body before the court at a certain time and place, still means nothing more than that he must give bail to the action, and often, in our practice, not even this, but that he must employ an attorney to appear for him; that when judgment has been obtained against a defendant who lives in a different county from that in which the venue was laid in the action, the writ of execution against him must state that a writ hath issued to

the county of the venue, though this be not the fact; and finally, the whole doctrine of relation: all of these, we say, will be found generally to rest on rules or presumptions adopted by the courts on the strictest reasons of logick, or on the soundest deductions of experience; and have been used mainly to subserve and expedite the ends of justice.

It must be confessed that some of these fictions and intendments have been continued after the reasons in which they originated have ceased; and that some of them also are very refined and innocently absurd.—But on the whole we are inclined to think, that the vehement objections on this subject which have been made by learned and ingenious authors, who have been rather unfriendly to the English common law, savour too much of cavil.—We are free to own, that could an enlightened body of men be invested with the power of lopping some of the excrescences which times and circumstances or ignorance may have generated in this admirable and extraordinary system, perhaps some good might be the result of such an enterprize; but until a re-modelling of that vast system is entrusted to very competent hands, we are sorry to see a spirit of opposition manifesting itself through party pamphlets, inconsiderate orations, and crude legislative speeches.

From these remarks we take great pleasure in excepting (and perhaps others might be included,) a very sensible production from the pen of an eminent member of the New York Bar. In the production to which we allude, we find many judicious observations on the evils and absurdities of the practice of the English common law, as adopted generally in this country; with some useful suggestions for their correction.—And although we do not entirely agree with this author, we cannot deny that he has placed most of his subject in a very forcible light. We shall take occasion to call your attention to this subject before we close the present lecture.

In the present state of the English judiciary, when the jurisdiction of the various courts is accurately distinguished and bounded, it presents a beautiful system both for the administration of justice in the first instance, and for the review and correction of their sentences. That arrangement of their courts called familiarly the *Nisi Prius* system, which sends the cause to be tried on the spot where it arose, and reserves general questions springing out of it, for the final decision of the high courts of Westminster Hall, is beyond doubt admirably adapted, *first* for the speedy disposition of causes, and *secondly* for bringing

important or doubtful points to be decided where the greatest learning and ability may pass upon them; and *thirdly* for preserving these decisions, as much as may be, uniform and consistent. And I must be permitted to say, without reflecting harshly on many of the judicial systems of this country and of this state in particular, that our plan, however it may have the advantage of bringing home justice, as it is said, more immediately to our own doors, falls in some of the respects I have just alluded to, far below the English system. The station of a judge in either of the high courts of England, is one of such dignity and *eclat*, that it can hardly fail to be filled with the first juridical talents and learning of the country; and as most of the disputed points come naturally before them in the course of judicial procedure, these have the advantage to be settled on the best grounds, and often after argument by all the judges of England. Points not less important come every day, according to the arrangement of our judiciary system, before persons whose learning and ability cannot reasonably be expected to be of the like imposing kind, because neither the emoluments, honours, nor apparent responsibility are the same. When we add to this the vast number of independent tribunals which, reckoning only

those of the highest appellate jurisdiction, the form of the American confederacy necessarily invests with the decisions of points growing out of our peculiar jurisprudence, either general or local, we see what room there is for great and daily increasing discordance in their judgments, and how difficult the attainment of a homogeneous system of law must necessarily be.

On the other hand, while the student admires the symmetrical system of the British courts, reduced into order in a long succession of years, and amidst the often conflicting claims of various jurisdictions,—he will find from this very circumstance something to displease our natural love of simplicity and directness, in the various fictions and suppositions by which the different courts of Westminster Hall have come to possess on various points a co-ordinate jurisdiction; and in the minute and intricate forms with which for this cause, with others, their procedure is encumbered. Yet here again it must not be forgotten, that these originated generally in the prudence and wisdom of the British judges, who finding, among other things, the number of actions to be constantly increasing from the extension of trade, and the multiplication of property in moveables, incorporated into law the assumptions of jurisdiction made

from time to time by the courts, in matters not originally within the scope of their cognizance. Hence the court of King's Bench now takes cognizance of *all* actions, under the fiction that the defendant has been guilty of a tresspass: The court of Exchequer, under the notion that the plaintiff is a debtor of the king; and that by reason of the defendant's undischarged debts to him, the plaintiff is the less able to pay his duty or debt to the king. I think too it must be acknowledged, that the grounds on which the court of Chancery has claimed jurisdiction in some matters now confessedly within its control, are extremely nice and metaphysical, and more defensible on the plea of high expediency, than on the ground of any directness of deduction, or on the ingenious legal fictions and intendments to which the chancellors resorted. • All these, and many other features which will present themselves in the course of your studies, however they may amuse you by an exhibition of the subtile expedients to which courts of justice resorted, may induce, perhaps, a wish that the system of English courts as regards practice, &c. could have been adapted to the exigencies of the times with more naturalness, directness, and good sense than it now exhibits, especially to the uninitiated observer.

The philosophick student, however, will not fail to remember, on the one hand, the clumsiness which is inevitable from adapting the forms of procedure framed in reference to one system of circumstances and policy, to the results of progressive and necessary change—and, on the other, the danger and great difficulty of entirely remodelling them, so as to fit them in all points to long established principles and usages. The student, therefore, must contentedly refer these anomalies to the nature of human affairs, which never permits the best adjusted system to endure long in complete fitness to its objects; and instead of complaining of these inelegant but useful devices of judges and courts, be happy to find them explainable by research into the antient foundations of the law, and generally subservient to the great ends of justice betwixt man and man. There is, after all, a good deal of gratification derivable from these inquiries; nor is it uncommon for the student, long engaged in tracing the origin of these fictions, to view them with that species of interest mentioned by Justice Blackstone in his beautiful simile of the feudal castle of the common law, more especially since he finds them to answer the necessities of justice in the modern condition of affairs, at the same time that they retain these antique and ex-

traordinary features. Though our admiration of the English common law is great, and we believe well grounded; and though the spirit of innovation is dangerous, as it cannot be restricted to wise heads and pure hearts, and is consequently to be indulged with great caution; yet I would not be understood that the fictions in various departments of the law, and especially the technicalities derived from the peculiar nature of the various actions, are in all instances necessary or convenient, and might not in a great degree be done away with, without injury to the substantial parts of the fabrick. The distinction between *assumpsit* and *tort*, for example, is perhaps not always well founded in the reason of things, when by merely varying the form from one to the other, a man shall succeed in vindicating a claim which he had otherwise failed in; and courts have sometimes been obliged both by policy and justice, to make this formal distinction of actions give way to obvious right and reason.* The forms of Roman actions, the modern bill in chancery, and the libel in courts proceeding on the basis of the Civil Law, show that this technical distinction of actions is not inherent or essential; and consequently that

* 1 E. N. P. Cases, 192. Peake's Cases, 223. S. C. *Sed vide* 8. D. E. 335

they may even now in a great degree be dispensed with without detriment, and perhaps with advantage to the ends of justice. How this may be done I will not presume to point out, as these remarks are made not so much with the view of suggesting a reform at this day, as of showing that the peculiar circumstances which have given the present shape to English actions, have not produced the most simple form of presenting claims and defences, nor of always deciding them according to sound justice. It is not that each action is not consistent in its own principles, but that their variety, complication, and nicety too often expose the client to loss from the want of adequate knowledge in those whose province it is to conduct suits. We have mentioned the simplicity of the forms and proceedings of the civil law; not that we would be understood as intimating either the policy or practicability of reducing ours to the same state, but merely to show that as refinements are not necessary, there would be no danger of impairing rights by a judicious and authorized retrenchment of forms.

In regard to the organization and jurisdiction of courts, also, we might indulge in similar remarks—time however will not serve; we shall therefore only casually notice that peculiar juris-

diction which is exercised among us by the chancellor, in contradistinction to the judge. The principles which sustain and limit this jurisdiction, are certainly much better known at present than in former times; but still there is no point on which it is more difficult to convey clear and definite notions to students, than on the true nature and province of a court of equity. In common acceptation equity is moral justice—and the uninformed can scarcely be persuaded that the chancellor's powers are not coextensive with the aims of right reason, and sound ethicks. But the student soon learns that moral equity and legal equity, (if the expressions be allowed) are often not synonymous; and, in process of time, he ascertains that a court of chancery is by no means a tribunal which decides every case on its own individual equity, as opposed to law, without regard to precedent and principle. He finds that it is at last in reality little else than a court of law, differing from other legal tribunals only in its modes of proof, trial, and relief, together with a few matters of exclusive jurisdiction; which however, are regulated by as certain a system of law, as any known to our jurisprudence. This being the case—the student naturally desires to know, why there should exist in the same scheme of jurisprudence two distinct

tribunals, so extremely different in the points I have mentioned. If the practice of chancery be the best adapted to the discovery of truth, and the administration of relief, as in many cases it undoubtedly is, why should not courts of law be invested with similar powers, and thus avoid the contradiction of denying justice at one tribunal, and granting it at another which professes to be guided by law and precedent, and not by the particular moral justice of a case? Before we can give any reply to this objection, we would admit that the existence of courts of equity rests on the concession, that the remedies provided in courts of common law are inadequate to render full justice; and that however usage and time may have diminished the inconvenience of this difference in the remedial power of these several tribunals, it certainly detracts from the simplicity, symmetry and reason of the English judicial system. But notwithstanding this concession, we would be the last to sanction either the amalgamation of these several jurisdictions, or the abolition of the known powers of chancery. The truth is, that the origin and necessity of this tribunal, and the answer to the objections I have stated, are to be found in the history of the common law itself. It must be remembered that this common law is the gradual

result of exigencies, the progressive accretion of ages;—a system of many parts, having at first no assimilating principle,—no common tie gradually bringing together its discordant materials. Courts of common law were coeval with this crude system; their principles of organization and action were moulded by that system; and it is not surprising when the progress of society demanded a judicial legislation varying from the common system, that distinct tribunals should gradually arise for its administration. This indeed is the historical fact. Courts of equity are comparatively of modern origin, and were introduced from a necessity imposed by the previous existence of tribunals jealous of their own powers, and their own system of judicial administration. Hence we see the origin of the existing anomaly, if it be one, of distinct tribunals in the same country: one often acting on essentially the same system of law, but still invested with powers, and administering a code, but little, if at all known, in the inception of the other. The complaints, therefore, which we often hear of the distinction between law and equity, and their separate administration, appear to us at this time highly unseasonable; first, because it was in its origin the child of necessity, and not of choice; secondly, because, in truth, there is no substantial

incongruity in distinct tribunals having different powers, and attaining the ends of justice by means peculiar to each. The fact, indeed, is to be found in a degree in every court: courts of admiralty and maritime jurisdiction, for example, have in some respects concurrent powers with the courts of common law. May it not then be asked, with nearly the same propriety,—why should the admiralty be permitted to adjudicate at all on such subjects, as its modes of trial, proof and relief are so different? If such questions can be made, then all distinction of tribunals must not only be unnecessary but wrong; and all courts must be resolved into one kind; or, in other words, every court must administer justice formally and substantially in the same way. But if we admit for the sake of argument, that it was originally practicable and politic that no such distinction as that which exists between law and equity, should have been introduced, it by no means follows that it can with safety be now abolished. If the power of chancery were stricken out of our scheme of jurisprudence, nearly the entire common law would have to be remodelled before a homogeneous system, commensurate with the aims of justice, could be produced. If, on the other hand, these powers be given to common law tribunals, great inconve-

nience would result from the amalgamation of a theory and practice in so many respects variant from those of the common law, whilst it is highly probable also, that equal confusion would be produced in the minds of the judges; and that few, if any, would be found equal to the task of administering both schemes in their primitive purity. A hybridous, and unseemly monster of the law would be generated from such a union, having the comeliness and the virtues of neither parent.

Whilst therefore we admit there is room for improvement, we contend that this can never be effected by individual ridicule, nor by any thing less than an unprejudiced, studious, and cautious exertion of the best legal talents of a nation, called forth by competent authority for that express purpose. Could this be done in each branch of the law under the same circumstances of eminent talent, extensive learning, and indefatigable research that appear in the author of the late projected code of Louisiana, the enterprise might indeed be safely entrusted in individual hands, to the high and permanent improvement of the science. But we zealously protest against that cavilling spirit which collects from the entire system its faults, with a view of producing by their concentration, an inflamed judgment, and of testing the merits

of the great whole, by a humorous display of its most prominent defects. This is neither useful nor ingenuous. No system of philosophy or of morals can endure such an ordeal; but with regard to the common law it is peculiarly unhappy, as many of these blemishes are either wholly innocent, or necessarily direct the student's inquiries into a more philosophical examination of the entire system.

If we pass from courts and the actions which they entertain, to the subject of practice, we shall find it, (so far as it is not merely arbitrary, and directed by particular provisions in different points,) to be one of great curiosity to every inquiring legal mind. We have already casually alluded to some of the fictions and intendments resorted to in this branch of the law; and though we found something to condemn in it, we have presumed to discourage the too growing spirit of innovation, which threatens to destroy not only the tares but the wheat also. The more we consider the peculiarities of this system, the more we shall find them to hinge on the recognized principles, and to be connected with the general philosophy of the law, insomuch that a student cannot peruse with understanding a book of practice, without having his mind perpetually recur to

leading principles. The complaints which are made of the difficulty of acquiring this kind of technical knowledge, can apply only to that practical skill which in every thing is the result of use only; and not to the understanding of the principles which govern its philosophy. But at the same time, while all these multiplied rules of practice undoubtedly have their foundation in the antient principles of law, and call up our knowledge on that very account, it cannot be denied by the most zealous admirer of the common law, that many of these rules proceed on suppositions which are no longer true in point of fact, if they ever were; and that while they may exercise the ingenuity of the learned jurisprudent, they are extremely puzzling to young practitioners, and confounding to the *lay-gents*, who are altogether innocent of this antiquated learning.

Thus, for example, the commencement of a suit in the court of King's Bench, when the defendant is not in Middlesex where the court sits, is by a *latitat;* which recites that there had previously issued a precept to the sheriff of Middlesex, viz. the Bill of Middlesex. But as there in fact never issues any Bill in such case, and as, when the Bill of Middlesex itself issues, namely, against a defendant residing in Middlesex, there is supposed

to have been a previous *Plaint*, with attachment thereon, and a return on the attachment, here are no less than four suppositions or intendments of facts which, in truth, never occurred, to warrant the issuing of the *latitat*. Another singularity is this: inasmuch as the Bill of Middlesex was framed originally as the process only in actions of trespass, the true cause of action is, from a reason familiar to students, never expressed in it, if the debt be under £40; and again, if above £40, the true cause of action is indeed expressed in the *ac etiam* clause, but it is in company with an untrue cause of action. All this is rather a clumsy contrivance, and a fiction, which to be sure deceives nobody, in order to vest jurisdiction in the court of King's Bench. As a further example we may mention, that the *latitat* is tested either on the first day of term, if sued out in term, or on the last day of the preceding one, if sued out in vacation; so that in either case it gives no notice of the real time of issuing the writ; and all this is because *in law* all the term, forsooth, is considered but as one day. Again; in the bailable Bill of Middlesex the sheriff is commanded to have the body of the defendant at Westminster, &c. but instead thereof bail is given to the sheriff for the defendant's appearance, which appearance is not made

in person, but in lieu of it an entry is made, and bail above put in, by an attorney. These forms and many others, as for example, the mode of entering what is called *common* bail—the giving of oyer, which is founded on the idea that a party to be affected by a deed, has it read to him in court—the clause in the *venire facias* and *distringas*, which, supposing what never comes to pass, orders the jury to be convened where it is never intended they shall come, and other similar cases present, as we have before stated, a string of fictions and legal intendments very extraordinary and unintelligible in the first instance to the learner. If to these we add the infinite number of entries, rules, motions and notices, some of which seem to have little other intent than to induce delay or to augment fees; and, moreover, the frequent transcripts of the record, the requisition of unnecessary affidavits, &c. we cannot but confess that, even when explained by reverting to old doctrines of the law, and the stubborn inflexibility of antient judicial procedure, much of this matter is not only deficient in simplicity, but is, in not a few instances, far from real utility. I have here alluded to the English practice only, because it is with that mainly that you can now be supposed in any degree acquainted. My remarks, however,

will be found not inapplicable to our own modes of practice. In some of the states many salutary improvements have certainly been made; but in others an ignorant spirit of reform, and an overweening hatred of that copious fountain, the common law of England, whence we derived our jurisprudence, have made sad havoc among the soundest principles known to the law of forensick proceedings; and little remains to regulate them but the good sense or folly, as the case may be, of those who preside in courts of justice.

Pleading shares very largely, in the view of the vulgar, in the obloquy attached to *practice:* Yet it is a system most nicely adjusted to the sense and requisitions of the common law; and its faults are those of that system, to which it strictly conforms, not those of its own structure. In the science of pleading (for it is well entitled to that appellation) much more depends on abstract reasoning, and less on arbitrary rules, than in the *practice* of courts. But as all close reasoning in matters removed from ordinary apprehension, seems to the uninformed too refined; and as the very nicety of the science must often produce unskilfulness in its professors; it happens from these two causes, that the refinements of pleading have been complained of as inimical to the inte-

rests of justice. That this nicety has sometimes degenerated into subtilty, this syllogistick strictness into formal technicality, I am not disposed to deny; but it is impossible once to understand the true nature and objects of pleading, without coming to the conclusion that it is a practical logick, and proceeds on its nice but infallible rules. Nor is it fair to confound the unskilfulness of practitioners with the science itself; or to conclude that pleading is sophistical or ridiculous, because pleaders are liable, from ignorance, to be both. It were as wise to ridicule reason itself, because there are bad reasoners.

The whole object of pleading is so to arrange the declarations of one party, and the denials of another;—the claims of the plaintiff, and the counter claims, excuses, or assertions of performance, of the defendant, as that, instead of disputing for ever on impertinent points, they shall come at once to issue on some point of fact or of law conclusive of the controversy. In verbal disputes (and pleadings were originally *ore tenus*) it is comparatively easy for the moderator of the argument to recal the combatants when they wander from the point; yet what endless controversies arise from false logick in the ordinary discourse even of intelligent men! But as pleadings are at

this day not conducted in the presence of the court, but are reduced into formal writings; and as the court cannot, from the nature of the thing, interfere at the moment to correct an errour, and so prevent other consequent errours; it must be so much the more rigid in the rules established for bringing the parties to a right understanding of what they disagree about,—the exact point on which they are willing to rest the merits of the case. To this end all the rules of good pleading are constructed,—with a strictness truly philosophical; and if the pleaders, from defect of skill, wander into entangled bye-paths, this is no sound objection against the science, as long as it presents in all cases, one broad legitimate road whereby the wanderer may, if he will, travel with expedition and certainty. The *short cuts* which the untechnical would pursue, though they might answer in particular instances, are very apt, in the main, to produce nothing but intricacy and confusion; and in pleading it will often be found, if I may indulge in perhaps a too colloquial phrase, that "the longest road round is the shortest way home."

Is there any thing that is not entirely philosophical and reasonable in requiring, for example, that the declaration shall contain a logical and legal

statement of the facts on which the suitor rests his claim;—that he shall not, however, state those which the court must *ex officio* notice; that it shall be made in the name of the parties, and of them only, in whom the law recognizes the right, if any, to exist,—lest property be thus transferred only from one wrong hand to another;—that the plea of the defendant shall be single and certain, in order that the plaintiff may not have to battle two points, when one will determine the controversy, and also that he may understand distinctly what is the nature of that one;—that when, as is sometimes the case, the defendant is allowed to plead two pleas to the same matter, he shall not plead such as are inconsistent, and so deny in one breath what he had asserted in another;—that he shall not traverse what the plaintiff has stated only by way of inducement or introduction;—that the plaintiff in replying shall not be guilty of a departure, or, in other words, induce the defendant to suppose from the declaration one ground of action, and prepare his proof accordingly, and then lead him in chase of another by his replication;—that the parties shall come to issue on something material to, and decisive of the question;—that the defendant shall not plead a plea to the jurisdiction or in abatement after his plea in bar, or

(to drop the technical language,) that he shall not first put the court to decide the main topick of controversy, and then go on to deny its power or right to decide it;—that a plea shall answer all the charges of the declaration, lest, after laborious investigation and trial of a point, it shall be discovered that it did not embrace all the merits of the question, and thus it should become necessary to go over the whole ground again? Are not these, and innumerable other rules of pleading, the best calculated to bring the real question to trial, by the mode which is at once the shortest and most correct? They certainly prove that the general foundation of pleading is sound logick and sound sense, and its aim the speedy and just settlement of conflicting claims.

The student will find that the rules I have stated of this admirable science, are at its very foundation. If pleaders mistake the right application of them, or if they wilfully misapply them, this is an accident that may befal the most perfect system, and is a vice inherent, not in the science of pleading, but in human nature itself. To get rid of these difficulties we must reform the human understanding, and eradicate baseness and the love of chicane from its morals. I am aware that the science of practice and pleading has its preten-

ders—its charlatans—those who departing from its philosophy and its justice, study its quirks and its quibbles, to entangle justice in the net of forms, and under the mask of shrewdness and skilful practice, to work every species of wrong. It is sometimes the case also, that the vulgar and the vicious applaud this as admirable; whilst the same vulgar, (with matchless inconsistency,) condemn the entire science and all its votaries, with the severest reprobation. But those who mistake the artful subtilties of some practitioners for skilful practice, are not further from the truth, than those who reprobate the science for the sins of a few of its unworthy retainers. The railers at our honourable science of the law, forget that it is impossible to establish general rules without seeing them misapplied; they forget that it is impossible to entrust discretion with the judges, lest it should be abused; and that it is equally impracticable to determine every case on its own equitable merits, lest all principle and precedent be lost, and confusion and an arbitrary will alone constitute law.

We should speedily, in such case, hear complaints of a quite opposite, and indeed more reasonable nature; viz. that all *precedent* was lost, all general principles neglected; and that law, instead of being a general, and therefore certain

rule, had become a something undefined and undefinable, resting in the discretion of various degrees of understanding and, what were worse, of honesty.

As, therefore, the rules of pleading are founded in logick, or, when technical, spring out of the principles of the common law, it is obvious that they are capable of being referred to a scientifick system, and explained upon it. This is manifest in every treatise of pleading, and the reader of Chitty finds it any thing but a dry, unphilosophical digest of arbitrary rules, without reason or mutual dependence. It were to be wished, however, that some able hand would undertake to explain in a more familiar and less technical manner than is usual, the connexion of pleading with the philosophy of logick on the one hand, and with the principles arising out of the nature of the English law on the other. The philosophy of pleading is a rich and ample field that has been but little trodden. The *bibliotheca legum* affords but a single essay on this interesting subject. I allude to Hammond's "Analysis of the Principles of Pleading"—a work which must be recommended in the absence of a better, it being too general, and quite too brief, to develope the nice connexions of plead-

ing, and its pervading consistency with common sense, and the common law.* Some of the rules of pleading appear arbitrary and inconvenient, only because we do not extend our consideration of them to their general operation, and to that mutual dependence of which I have just spoken. Thus, for instance, the student finds that on a covenant with *two* for the benefit of *one* of them, who dies, the interest goes to the representative of the person benefited, and the right of action to the surviving covenantee, because the action, for many good reasons, must follow the nature of the legal interest. Again, he will find that when a contract is made with several, if the interest is joint, the action *ex contractû* must be joint, although the covenant were in terms joint and several; because a court could not know, if all could sue separately, for whom to give judgment. So also, a proviso in mere defeazance of a contract, need not be stated in declaring on the contract; but if it form a con-

* Since this lecture was delivered, a still more elementary and scientifick treatise of pleading has appeared from the pen of Mr. Stephen. This production should be in the hands of every student of law; and, in the commencement of this branch of his studies, it should be his *vade mecum*. It has certainly supplied many of the *desiderata* of which we have been speaking.

dition precedent, it must, because it may be that the contract, from the non-performance of the condition, never took existence at all. Likewise the student finds that time and place must be stated, and often the true time and place: The first, that the defendant may know what particular contract he is to disprove, and the court, that it arose before action brought; the second, to inform the sheriff from what neighbourhood to summon the triers: and so as to innumerable other rules, the seeming arbitrariness will be found to arise, not from the defect of the science, but from our ignorance of it. Even the curious and subtile doctrine of *colour* in pleading, is not deficient in philosophy and utility. It is based on the necessity which the pleaders conceived there was, of preserving in its integrity, not only the substance, but the forms of systematick pleading. This giving of colour, moreover, could be productive of no evil, but rather of good; inasmuch as the matter suggested by way of colour, was known to be fictitious, and therefore not to be traversable; while, at the same time, it reminded all concerned in it, of the necessity of preserving a harmonious operation of the rules of pleading, which, in the absence of colour, would have made an issue triable by a jury; whereas the

party by giving colour effected his object of transferring the issue to the decision of the court. In fine, it appears to me, that the great object of all good pleading is to produce a material, simple, and certain issue of law or of fact, and that this shall be effected with the least possible delay, prolixity, or obscurity. And although the primary rules of pleading may sometimes operate with severity, yet, like all other legislation, they are to be judged of, not by the partial evil they may sometimes occasion, but by the good which they most generally produce. We may extend the same remarks to the rules of *evidence*, respecting which the careful student will probably arrive at the conclusion of Mr. M'Kinnon, viz. "that the law of evidence, as found in the books, is founded on correct logick, applied to a profound knowledge of human nature, and the diversified concerns of human life." And here let me observe, that one of the greatest among legal *desiderata*, is a familiar exposition of the philosophy of evidence; a topick which has, perhaps, never been written on, with the exception of the very unsatisfactory essay of Mr. M'Kinnon, and the scattered remarks of Mr. Kirwan.

In concluding this address, gentlemen, I would only remark, that the carpers against our doctrine

of evidence seem to forget, that it is only with disputed and complicated points that lawyers have to do; and that these had never been brought into question, if they had not either been involved in doubt by their own intrinsick difficulty, or their true merits purposely concealed by interest and fraud. They who are thus perpetually traversing, as it were, a region of defiles, can neither be expected to reach their point with the same facility, nor to pursue the same modes of travelling, as those who have a plainer and less embarrassed path. In the infinite number of ill-worded agreements, who, with all the helps of art, shall extract with perfect certainty the true meaning of parties, whom fraud renders unwilling, or ignorance or death incapable to express it themselves? Who, in the imperfection of language, shall adjust the exact meaning to an ambiguous but material word? Who can contrive always, even by the most skilful investigation of all parts of a story, to discover the latent inconsistency and deceit? Who shall apportion the just degree of credit to be given to or withdrawn from various degrees of capacity, interest, competence, and favour? In fact, in the practical application of this important branch of the law, the advocate requires high and rare endowments of the